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ECLI:EU:C:2019:757

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

18 September 2019 ([\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=217867&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2524972" \l "Footnote*))

(Reference for a preliminary ruling — Social policy — Directive 2010/18/EU — Revised Framework Agreement on parental leave — National legislation making the granting of parental leave conditional on a reduction in working time, with a proportional reduction in pay — Shift work with variable hours — Request of the worker to perform his work at a fixed schedule to care for his minor children — Directive 2006/54/EC — Equal opportunities and equal treatment of men and women in employment and occupation — Indirect discrimination — Partial inadmissibility)

In Case C‑366/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 33 de Madrid (Social Court No 33, Madrid, Spain), made by decision of 29 May 2018, received at the Court on 5 June 2018, in the proceedings

**José Manuel Ortiz Mesonero**

v

**UTE Luz Madrid Centro,**

THE COURT (Sixth Chamber),

composed of C. Toader, President of the Chamber, A. Rosas and M. Safjan (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–        UTE Luz Madrid Centro, by M.A. Cruz Pérez, abogado,

–        the Spanish Government, by S. Jiménez García, acting as Agent,

–        the European Commission, by A. Szmytkowska and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1        This request for a preliminary ruling concerns the interpretation of Articles 8, 10 and 157 TFEU, Article 3 TEU, Article 23 and Article 33(2) of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the ‘Charter’) and Articles 1 and 14(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), read in conjunction with Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13).

2        The request has been made in the context of proceedings between Mr José Manuel Ortiz Mesonero and UTE Luz Madrid Centro concerning the latter’s refusal to grant him the right to work at a fixed schedule in order to care for his children.

**Legal context**

***European Union law***

*Directive 2006/54*

3        Under Article 1 of Directive 2006/54, which is entitled ‘Purpose’:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a)      access to employment, including promotion, and to vocational training;

(b)      working conditions, including pay;

(c)      occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.’

4        Article 2 of that directive, entitled ‘Definitions’, provides, in paragraph 1 thereof:

‘For the purposes of this Directive, the following definitions shall apply:

…

(b)      “indirect discrimination”: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

… ’

5        Article 14 of that directive, entitled ‘Prohibition of discrimination’, provides in paragraph 1:

‘There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(c)      employment and working conditions, including dismissals, as well as pay as provided for in Article 141 [EC]’.

*Directive 2010/18*

6        The revised Framework Agreement on parental leave, concluded on 18 June 2009 (hereinafter referred to as the ‘Framework Agreement on parental leave’), is set out in the annex to Directive 2010/18. Paragraphs 15 and 16 of the general considerations of that framework agreement state:

‘15.      Whereas this agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time off from work on grounds of *force majeure*, and refers back to Member States and social partners for the establishment of conditions for access and modalities of application in order to take account of the situation in each Member State;

16.      Whereas the right of parental leave in this agreement is an individual right and in principle non-transferable, and Member States are allowed to make it transferable. Experience shows that making the leave non-transferable can act as a positive incentive for the take up by fathers, the European social partners therefore agree to make a part of the leave non-transferable’.

7        Clause 1 of that framework agreement, entitled ‘Purpose and scope’, provides, at points 1 and 2:

‘1.      This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice.

2.      This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State.’

8        Clause 2 of the Framework Agreement on parental leave, entitled ‘Parental leave’, reads as follows:

‘1.      This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to 8 years to be defined by Member States and/or social partners.

2.      The leave shall be granted for at least a period of 4 months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the 4 months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.’

9        Clause 3 of that framework agreement, entitled ‘Modalities of application’, provides, at point 1:

‘The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreements in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or social partners may, in particular:

(a)      decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system, taking into account the needs of both employers and workers;

…’

10      Clause 6 of the framework agreement, entitled ‘Return to work’, provides, at point 1:

‘In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers’ and workers’ needs.

The modalities of this paragraph shall be determined in accordance with national law, collective agreements and/or practice.’

***Spanish law***

11      Article 34(8) of Real Decreto Legislativo 2/2015, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers’ Statute) of 23 October 2015 (BOE No 255 of 24 October 2015, p. 100224), in the version applicable at the time of the facts in the main proceedings (‘the Workers’ Statute’), states:

‘Workers shall have the right to adapt their hours of work and work schedule in order to make effective their right to reconcile personal, family and work life, in the terms established in the collective negotiation or in the agreement reached with the employer complying, in any event, with the terms of that negotiation.

…’

12      Article 37(6) of the Workers’ Statute is worded as follows:

‘Any person who, for reasons of legal custody, takes direct care of a child under the age of 12 years or of a person with a disability who does not carry out a gainful activity shall be entitled to a reduction in his or her hours of work, with a proportionate reduction in salary, of a minimum of one eighth and a maximum of one half of the duration of those hours.

The same right is granted to anyone who has to care directly for a family member up to the second degree or by marriage who, because of age, accident or illness, cannot care for himself or herself and does not engage in a remunerated activity.

…’

**The dispute in the main proceedings and the question referred for a preliminary ruling**

13      Mr Ortiz Mesonero was hired by UTE Luz Madrid Centro, a temporary union between SICE SA, Urbalux SA, ImesAPI SA, Extralux SA and Citelum Ibérica SA, which won the contract for the maintenance of electric lighting in Madrid (Spain). The employment contract concluded between the two parties is subject to the Madrid Metallurgical Industry Collective Agreement.

14      Mr Ortiz Mesonero has two children, born in 2010 and 2014 respectively. His wife is a lawyer.

15      UTE Luz Madrid Centro uses a shift work system which is organised in teams for that purpose: a morning team from 7:15 a.m. to 3:15 p.m., an afternoon team from 3:15 p.m. to 11:15 p.m., and a night team from 11:15 p.m. to 7:15 a.m. Mr Ortiz Mesonero rotates between those three teams, with a rest period of 2 days a week, which varies according to the schedules drawn up by the employer.

16      On 26 March 2018, Mr Ortiz Mesonero asked UTE Luz Madrid Centro to be able to work exclusively in the morning team, from Monday to Friday, maintaining the same number of working hours, without a reduction in pay, in order to take care of his children. That request was rejected by his employer.

17      Mr Ortiz Mesonero appealed against that rejection decision to the referring court, the Juzgado de lo Social No 33 de Madrid (Social Court No 33 of Madrid, Spain).

18      The referring court notes that Mr Ortiz Mesonero made his request for integration into the morning working team on the basis of Article 34(8) of the Workers’ Statute. However, no agreement between Mr Ortiz Mesonero and his employer, nor the Madrid Metallurgical Industry Collective Agreement, implemented that provision. In those circumstances, that court decided, pursuant to the Spanish Code of Civil Procedure, which empowers the judicature to decide the case in accordance with the applicable rules, even if they were not properly invoked by the parties to the dispute, that Mr Ortiz Mesonero’s request was in fact based on Article 37(6) of the Workers’ Statute.

19      The latter provision merely provides for the right of workers to obtain, in order to reconcile family and professional life, a reduction in ordinary working time and a proportional reduction in pay.

20      Under the same provision, the possibility for workers to request a different arrangement of working hours, without their working time and salary being reduced, is not provided for. However, where the production activity extends over a longer period of time than the working time to be carried out by the worker, it is possible, without reducing that working time, to adapt the working time in order to make it compatible with family needs. In the present case, this would be the case for Mr Ortiz Mesonero, since there are three shift work teams between which he rotates.

21      The referring court states in particular that, according to statistics relating to the 2011 censuses drawn up by the Instituto Nacional de Estadística (National Statistics Institute, Spain), 23.79% of female workers had reduced their working time by more than 1 month in order to care for their children, compared with 2.05% of male workers.

22      The referring court submits that, even if the question referred for a preliminary ruling is based on the fact that the applicable national legislation indirectly discriminates against female workers on grounds of sex, the fact that, in the present case, it is a man and not a woman who is requesting an adjustment of his working time in order to reconcile his family life and his professional life cannot mean that that question is hypothetical. If it were found that that national legislation indirectly discriminates against female workers, the effects of that finding would also apply to male workers invoking the right to reconcile their family and professional life.

23      The referring court also states that the provisions relating to the reconciliation of family and working life laid down by the Spanish legislature are more favourable than those laid down in Clause 2(2) of the Framework Agreement on parental leave. However, their more favourable nature cannot justify the fact that the application of the national legislation is contrary to the principle of gender equality.

24      Consequently, referring to the judgments of the Court of 30 September 2010, *Roca Álvarez* (C‑104/09, EU:C:2010:561), of 20 June 2013, *Riežniece* (C‑7/12, EU:C:2013:410), and of 16 July 2015, *Maïstrellis* (C‑222/14, EU:C:2015:473), the referring court raises doubts as to whether Article 37(6) of the Workers’ Statute constitutes indirect discrimination against female workers, the first users of parental leave.

25      In those circumstances, the Juzgado de lo Social No 33 de Madrid (Social Court No 33, Madrid) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do Articles 8, 10 and 157 TFEU, Article 3 TEU, Article 23 and Article 33(2) of the [Charter], and Article 1 and Article 14(1) of Directive [2006/54], all taken in conjunction with Directive [2010/18] preclude a rule of national law such as Article 37(6) of the Workers’ Statute, which makes it a requirement that in order to exercise the right to reconcile family life and working life so as to be able to care directly for children or family members for whom they are responsible, workers must in all cases reduce their ordinary working hours, with a consequent proportional reduction in salary?’

**Consideration of the question referred**

***Admissibility***

26      In its written observations, the Spanish Government pleads the manifest inadmissibility of the question referred for a preliminary ruling.

27      Referring to paragraph 43 of the judgment of 30 September 2010, *Roca Álvarez* (C‑104/09, EU:C:2010:561), that government submits that, even if it cannot be excluded that the right provided for in Article 37(6) of the Workers’ Statute falls within the concept of ‘parental leave’ within the meaning of Directive 2010/18, the decision to refer does not set out the content of the national provisions on parental leave and does not specify the reasons why that right should be considered as parental leave within the meaning of that directive.

28      Moreover, the Spanish Government submits that the referring court does not explain the relationship it establishes between Article 37(6) of the Workers’ Statute and Articles 1 and 14(1) of Directive 2006/54, to which it refers in its question.

29      In that regard, it should be borne in mind that, according to settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is bound, in principle, to give a ruling (judgment of 2 May 2019, *Asendia Spain*, C‑259/18, EU:C:2019:346, paragraph 15 and the case-law cited).

30      Thus, the need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The Court is empowered to rule on the interpretation of EU provisions only on the basis of the facts which the national court puts before it (judgment of 2 May 2019, *Asendia Spain*, C‑259/18, EU:C:2019:346, paragraph 17 and the case-law cited).

31      The referring court must also set out the precise reasons why it is unsure as to the interpretation of certain provisions of EU law and why it considers it necessary to refer questions to the Court for a preliminary ruling. It is also essential that the national court should provide at the very least some explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link which it establishes between those provisions and the national legislation applicable to the proceedings pending before it (judgment of 2 May 2019, *Asendia Spain*, C‑259/18, EU:C:2019:346, paragraph 18 and the case-law cited).

32      Those requirements concerning the content of a request for a preliminary ruling are explicitly set out in Article 94 of the Rules of Procedure of the Court, according to which any request for a preliminary ruling is to contain ‘a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based’, ‘the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law’ and ‘a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings’.

33      In the present case, it should be noted that, under the first subparagraph of Article 37(6) of the Workers’ Statute, any person who, for reasons of legal custody, takes direct care of a child under the age of 12 years or of a person with a disability who does not carry out a gainful activity is to be entitled to a reduction in his or her hours of work, with a proportionate reduction in salary, of a minimum of one eighth and a maximum of one half of the duration of those hours.

34      In the first place, with regard to the application of Directive 2010/18 in a case such as that in the main proceedings, the referring court considers that that directive constitutes open legislation, which must be supplemented in each Member State, and that the Kingdom of Spain has chosen, in accordance with Article 34(8) and Article 37(6) of the Workers’ Statute, to establish a minimum legal framework which can be improved by means of collective or individual agreements. That court is therefore of the opinion that the right of workers referred to in Article 37(6) of the Workers’ Statute falls within the concept of ‘parental leave’ within the meaning of Directive 2010/18.

35      Given that the national court has thus established a link between that directive and Article 37(6) of the Workers’ Statute, in so far as it concerns Directive 2010/18, the question raised cannot be rejected as inadmissible.

36      In the second place, the referring court states, in essence, that Directive 2010/18 must be interpreted in the light of the principle of equality between women and men and the right to family life, enshrined in Article 23 and Article 33(2) of the Charter. Consequently, in so far as it concerns those provisions of the Charter, the question raised must be declared admissible.

37      In the third place, with regard to Directive 2006/54, the referring court considers that Article 37(6) of the Workers’ Statute introduces indirect discrimination against female workers within the meaning of Article 2(1)(b) of that directive.

38      In this respect, it is important to note that Article 37(6) constitutes a rule that applies indiscriminately to male and female workers, unlike the national legislation at issue in the cases which gave rise to the judgments of 30 September 2010, *Roca Álvarez* (C‑104/09, EU:C:2010:561) and of 16 July 2015, *Maïstrellis* (C‑222/14, EU:C:2015:473).

39      However, the referring court does not demonstrate, in the presence of such an indiscriminate rule, what the particular disadvantage suffered, in a case such as that in the main proceedings, by a male worker such as Mr Ortiz Mesonero would be if indirect discrimination on grounds of sex applies to female workers.

40      Consequently, the finding of indirect discrimination against female workers, assuming that it exists, does not appear relevant to the resolution of the dispute in the main proceedings. Consequently, in so far as it concerns Directive 2006/54, the question raised is of a hypothetical nature and must therefore be considered inadmissible.

41      Finally, the national court also refers in its question to Articles 8, 10 and 157 TFEU and Article 3 TEU.

42      However, that court does not specify either the reasons which led it to question the interpretation of those provisions or the link it establishes between those provisions and the national legislation at issue in the dispute submitted to it. Consequently, there is no need to interpret those same provisions.

43      In the light of the foregoing considerations, it must be held that the question referred for a preliminary ruling is admissible in so far as it concerns Directive 2010/18 and Articles 23 and 33(2) of the Charter and is inadmissible in respect of Directive 2006/54, Articles 8, 10 and 157 TFEU and Article 3 TEU.

***Substance***

44      The referring court asks, in essence, whether Directive 2010/18 and Articles 23 and 33(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a worker’s right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work.

45      In this respect, it should be noted that, under Clause 1(1) of the Framework Agreement on parental leave, the framework agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, while respecting national law, collective agreements and/or practice.

46      The only provision of the Framework Agreement on parental leave relating to the adjustment of working time is Clause 6(1) of the Framework Agreement, under which Member States and/or social partners are to take the necessary measures to ensure that workers, when ‘returning from parental leave’, may request changes to their working hours and/or patterns for a set period of time.

47      In this case, Mr. Ortiz Mesonero, whose usual work pattern is shift work with variable hours, wishes to have his working schedule adjusted to allow him to work a fixed schedule. It is not apparent from the decision to refer that he is in a situation of returning from parental leave within the meaning of Clause 6(1) of that framework agreement.

48      In those circumstances, it should be noted that neither Directive 2010/18 nor the Framework Agreement on parental leave contain any provision which would require Member States, in the context of a request for parental leave, to grant the applicant the right to work a fixed working time when his usual pattern of work is shift work with variable hours.

49      With regard to Article 23 and Article 33(2) of the Charter, it is important to recall that, under Article 51(1) of the Charter, the provisions of the Charter are addressed to Member States only when they are implementing Union law. Article 6(1) TEU and Article 51(2) of the Charter provide that the provisions of the Charter do not extend the field of application of Union law beyond the powers of the Union as defined in the Treaties.

50      In that regard, it follows from the Court’s consistent case-law that, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (judgment of 26 February 2013, *Åkerberg Fransson*, C‑617/10, EU:C:2013:105, paragraph 22, and order of 15 May 2019, *Corte dei Conti and Others*, C‑789/18 and C‑790/18, not published, EU:C:2019:417, paragraph 28).

51      In the present case, in so far as it is apparent from paragraphs 40, 42 and 48 of this judgment that neither Directive 2010/18 nor any other provision referred to in the preliminary question is applicable to the main proceedings, it does not appear that that dispute concerns national legislation implementing Union law within the meaning of Article 51(1) of the Charter (see, by analogy, order of 15 May 2019, *Corte dei Conti and Others*, C‑789/18 and C‑790/18, not published, EU:C:2019:417, paragraph 29).

52      Consequently, there is no need to interpret Article 23 and Article 33(2) of the Charter.

53      In the light of the foregoing considerations, the answer to the question raised is that Directive 2010/18 must be interpreted as not applying to national legislation, such as that at issue in the main proceedings, which provides for a worker’s right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work.

**Costs**

54      Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

**Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC must be interpreted as not applying to national legislation, such as that at issue in the main proceedings, which provides for a worker’s right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work.**

[Signatures]

[\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=217867&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2524972" \l "Footref*)      Language of the case: Spanish.

Fine modulo